

THE HONORABLE JAMES L. ROBART

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

WIZARDS OF THE COAST LLC.

Plaintiff,

vs.

CRYPTOZOIC ENTERTAINMENT, LLC.,
and HEX ENTERTAINMENT, LLC.

Defendant.

CASE No. 2:14-CV-00719-JLR

DEFENDANT HEX
ENTERTAINMENT LLC'S ANSWER
AND AFFIRMATIVE DEFENSES TO
AMENDED COMPLAINT

Defendant Hex Entertainment, LLC ("Hex") hereby answers the Amended Complaint (Dkt. No. 14-1) filed by Plaintiff Wizards of the Coast LLC ("Plaintiff" or "Wizards"), as set forth below. Hex specifically denies all allegations not expressly admitted below.

INTRODUCTION

Fearing competition in the trading card game industry, and frantic about the loss of its monopoly position due to the expiration of its patent two months ago, Wizards seeks to eliminate Hex: Shards of Fate through litigation rather than fair marketplace competition. Wizards is understandably concerned about the success and significant support Hex: Shards of Fate enjoys in a community yearning for innovation. Wizards' Amended Complaint relies, in substantial part, on the hearsay allegations of unknown bloggers. The confused, vague, and egregious allegations in that Amended Complaint constitute a blatant attempt to use the legal

1 process to achieve market dominance and eliminate a competitor which is creating truly
2 competitive and innovative products.

3 Wizards' assertion of its patent is an example of its efforts to litigate a smaller competitor
4 out of business, rather than compete fairly in the marketplace. It asserted its now-expired patent
5 in an apparent attempt to intimidate Hex and Cryptozoic. Wizards knew at the time it filed its
6 original Complaint that it could never have obtained patent injunctive relief—either preliminary
7 or permanent. And, even if Wizards' patent were to be held valid over the numerous
8 affirmative defenses asserted below, even if it were held to be enforceable and infringed, and
9 even if Wizards were somehow entitled to money damages for patent infringement, such
10 damages would be much less than the cost of this litigation to Wizards in view of the brief
11 patent term involved.

12 Wizards' copyright claims are inconsistent with the very purpose underlying copyright
13 law-- the protection of an original expression and not the underlying idea. Wizards' Amended
14 Complaint is vague as to what is allegedly infringed, using ambiguous terms like "flow of
15 Magic," "circumstances," or "play sequence" in its allegations of infringement. Moreover,
16 Wizards should not be able to improperly extend its patent monopoly by asserting copyright
17 protection over functional concepts.

18 Finally, Wizards spends substantial space in its Amended Complaint on its allegations of
19 trade dress infringement but again relies on hearsay and unknown bloggers as the alleged basis
20 of infringement. While Wizards alleges that the trading card community confuses the Magic and
21 Hex games, its 34-page Amended Complaint fails to identify a single individual who has been
22 actually confused. A review of its Amended Complaint makes clear that each of the quoted,
23 unidentified, bloggers clearly knows the difference between the Magic and Hex: Shards of Fate
24 games.

25 Nothing in this Introduction constitutes, or should be interpreted as, an admission of any

claim or allegation in the Amended Complaint. Hex responds specifically to each and every allegation of the Amended Complaint as follows:

I. NATURE OF THE ACTION¹

1. Hex admits that Wizards purports to bring this action alleging misappropriation and infringement of Wizards' alleged intellectual property. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 1 of the Complaint as they relate to Cryptozoic Entertainment LLC (hereinafter "Cryptozoic") and, on that basis, denies them. Except as specifically admitted, Hex denies the remaining allegations of Paragraph 1 of the Complaint.

2. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 2 of the Complaint and, on that basis, denies them.

3. Hex admits that it is involved in the development and marketing of the game Hex: Shards of Fate. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 3 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Except as specifically admitted, Hex denies the remaining allegations of Paragraph 3 of the Complaint as they relate to Hex except those allegations that consist of legal contentions or legal arguments to which no response is required.

4. Hex admits that Cory Jones is the President and CEO of Hex Entertainment LLC. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 4 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex objects to the term "professional Magic player" as indefinite and, on that basis, denies the allegations relating to this term. Except as specifically admitted, Hex denies the remaining

¹Hex repeats the headings set forth in the Complaint for ease of reference and to simplify comparison of the Complaint and this Answer. By doing so, Hex makes no admission regarding the substance of the headings or any other allegation of the Complaint. To the extent that a particular heading can be construed as an allegation, or otherwise contains a factual and/or legal characterization, Hex specifically denies all such allegations and/or characterizations.

1 allegations of Paragraph 4 of the Complaint as they relate to Hex except those allegations that
2 consist of legal contentions or legal arguments to which no response is required.

3 5. Hex lacks knowledge or information sufficient to form a belief as to the
4 allegations of Paragraph 5 as they relate to Cryptozoic and, on that basis, denies them. Except as
5 specifically admitted, Hex denies the remaining allegations of Paragraph 5 of the Complaint as
6 they relate to Hex except those allegations that consist of legal contentions or legal arguments to
7 which no response is required.

8 6. Hex lacks knowledge or information sufficient to form a belief as to the
9 allegations of Paragraph 6 as they relate to Cryptozoic and, on that basis, denies them. Hex
10 denies the remaining allegations of Paragraph 6 of the Complaint as they relate to Hex except
11 those allegations that consist of legal contentions or legal arguments to which no response is
12 required.

13 7. Hex denies the allegations of Paragraph 7 of the Complaint except those
14 allegations that consist of legal contentions or legal arguments to which no response is required.

15 8. Hex admits that Wizards had notified Hex requesting changes to Hex: Shards of
16 Fate. Hex also admits that Hex and Wizards were negotiating potential changes to Hex: Shards
17 of Fate through counsel. Hex denies that during pre-suit negotiations Wizards identified with
18 particularity which parts of Hex: Shards of Fate allegedly infringed Wizards' intellectual
19 property. Hex lacks knowledge or information sufficient to form a belief as to the allegations of
20 Paragraph 8 as they relate to Cryptozoic and, on that basis, denies them. Except as specifically
21 admitted, Hex denies the remaining allegations of Paragraph 8 of the Complaint as they relate to
22 Hex.

23 9. Hex lacks knowledge or information sufficient to form a belief as to the
24 allegations of Paragraph 9 as they relate to Cryptozoic and, on that basis, denies them. Hex
25 denies the remaining allegations of Paragraph 9 of the Complaint except those allegations that

1 consist of legal contentions or legal arguments to which no response is required.

2 **II. JURISDICTION AND VENUE**

3 10. Hex admits the allegations of Paragraph 10 of the Complaint except those
4 allegations that consist of legal contentions or legal arguments to which no response is required.

5 11. Hex admits the allegations of Paragraph 11 of the Complaint except those
6 allegations that consist of legal contentions or legal arguments to which no response is required.

7 12. Hex objects to the term “Defendant” as indefinite and, on that basis, denies the
8 allegations of Paragraph 12 of the Complaint. To the extent the term “Defendant” is meant to
9 reference Hex, Hex denies the allegations of Paragraph 12 of the Complaint except those
10 allegations that consist of legal contentions or legal arguments to which no response is required.

11 13. Hex admits that it has distributed and released a closed, online only beta version
12 of Hex: Shards of Fate in the United States. Hex lacks knowledge or information sufficient to
13 form a belief as to the allegations of Paragraph 13 as they relate to Cryptozoic and, on that
14 basis, denies them. Except as specifically admitted, Hex denies the remaining allegations of
15 Paragraph 13 of the Complaint as they relate to Hex except those allegations that consist of
16 legal contentions or legal arguments to which no response is required.

17 14. Hex lacks knowledge or information sufficient to form a belief about the truth of
18 the allegations of Paragraph 14 of the Complaint as they relate to Cryptozoic and, on that basis,
19 denies them. Hex denies the allegations of Paragraph 14 of the Complaint as they relate to Hex
20 except those allegations that consist of legal contentions or legal arguments to which no
21 response is required

22 15. Hex lacks knowledge or information sufficient to form a belief about the truth of
23 the allegations of Paragraph 15 of the Complaint as they relate to Cryptozoic and, on that basis,
24 denies them. Hex objects to the use of the term “defendant” as indefinite and therefore denies all
25 allegations relating to “defendant.” To the extent “defendant” is meant to reference Hex, Hex

1 denies the allegations of Paragraph 15 except those allegations that consist of legal contentions
2 or legal arguments to which no response is required.

3 16. Hex lacks knowledge or information sufficient to form a belief about the truth of
4 the allegations of Paragraph 16 of the Complaint as they relate to Cryptozoic and, on that basis,
5 denies them. Hex objects to the use of the term “repeated played” as indefinite and therefore
6 denies all allegations relating to this term. Hex lacks knowledge or information sufficient to
7 form a belief about the truth of the allegations of Paragraph 16 of the Complaint as they relate to
8 Magic Online servers or activities regarding Magic and, on that basis, denies them. Hex denies
9 the allegation of Paragraph 16 of the Complaint that personal jurisdiction within the District is
10 appropriate. Hex denies the remaining allegations of Paragraph 16 of the Complaint as they
11 relate to Hex except those allegations that consist of legal contentions or legal arguments to
12 which no response is required.

13 17. Hex objects to the use of the term “Defendant” as indefinite and therefore denies
14 all allegations relating to “Defendant.” To the extent the term “Defendant” is meant to reference
15 Hex, Hex denies all allegations of Paragraph 17. Hex denies the remaining allegations of
16 Paragraph 17 of the Complaint except those allegations that consist of legal contentions or legal
17 arguments to which no response is required.

18 **III. THE PARTIES**

19 18. Hex lacks knowledge or information sufficient to form a belief about the truth of
20 the allegations of Paragraph 18 of the Complaint and, on that basis, denies them.

21 19. Hex lacks knowledge or information sufficient to form a belief about the truth of
22 the allegations of Paragraph 19 of the Complaint as they relate to Cryptozoic and, on that basis,
23 denies them. Hex admits that Hex Entertainment LLC is a California limited liability company
24 maintaining a place of business at 25351 Commercentre Drive, Suite 250, Lake Forest, CA
25 92630. Hex denies the remaining allegations of Paragraph 19 of the Complaint.

20. Hex admits that it participates in the development of Hex: Shards of Fate. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 20 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Except as specifically admitted, Hex denies the remaining allegations of Paragraph 20 of the Complaint as they relate to Hex except those allegations that consist of legal contentions or legal arguments to which no response is required.

IV. GENERAL ALLEGATIONS

21. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 21 of the Complaint and, on that basis, denies them.

22. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 22 of the Complaint and, on that basis, denies them.

23. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 23 of the Complaint and, on that basis, denies them.

24. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 24 of the Complaint and, on that basis, denies them.

25. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 25 of the Complaint and, on that basis, denies them.

26. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 26 of the Complaint and, on that basis, denies them.

27. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 27 of the Complaint and, on that basis, denies them.

28. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 28 of the Complaint and, on that basis, denies them.

29. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 29 of the Complaint and, on that basis, denies them.

30. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 30 of the Complaint and, on that basis, denies them.

31. Hex objects to the terms “intimately familiar,” “competitive Magic player,” and “Organized Play” as indefinite and, on that basis, denies the allegations relating to these terms. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegation that Mr. Jones “has been a member of the DCI since January 13, 1996” and other allegations as to Mr. Jones and, on that basis, denies them. Hex denies the remaining allegations of Paragraph 31 of the Complaint as they relate to Hex except those allegations that consist of legal contentions or legal arguments to which no response is required.

32. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 32 of the Complaint and, on that basis, denies them.

33. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 33 of the Complaint and, on that basis, denies them.

34. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 34 of the Complaint and, on that basis, denies them.

35. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 35 of the Complaint and, on that basis, denies them.

36. Hex admits that Appendix 1 to the Complaint includes a list of purported copyrights purportedly related to the game Magic: The Gathering. Hex objects to the term “prudent steps” as indefinite and, on that basis, denies the allegations relating to this term. Except as specifically admitted, Hex lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 36 of the Complaint and, on that basis, denies them.

37. Hex admits that United States Patent No. 5,662,332 (“the ’332 patent”) was issued with 60 claims, including over 25 independent claims in 1997 to Wizards and reissued as

1 United States Patent No. RE 37,957 (“the ’957 Patent”) in 2003. Hex objects to the term
2 “enhanced” as indefinite and, on that basis, denies the allegations relating to this term. Hex
3 denies the remaining allegations of Paragraph 37 of the Complaint as they relate to Hex.

4 38. Hex lacks knowledge or information sufficient to form a belief about the truth of
5 the allegations of Paragraph 38 of the Complaint as they relate to Cryptozoic and, on that basis,
6 denies them. Hex objects to the term “loyal” as indefinite and, on that basis, denies the
7 allegations relating to this term. Hex denies the remaining allegations of Paragraph 38 of the
8 Complaint as they relate to Hex except those allegations that consist of legal contentions or
9 legal arguments to which no response is required.

10 39. Hex lacks knowledge or information sufficient to form a belief about the truth of
11 the allegations of Paragraph 39 of the Complaint as they relate to Cryptozoic and, on that basis,
12 denies them. Hex lacks knowledge or information sufficient to form a belief about the truth of
13 the allegations of Paragraph 39 of the Complaint as they relate to Wizard’s card releases and
14 purported copyright protection efforts, and, on that basis, denies them. Hex denies the
15 remaining allegations of Paragraph 39 of the Complaint as they relate to Hex.

16 40. Hex lacks knowledge or information sufficient to form a belief about the truth of
17 the allegations of Paragraph 40 of the Complaint and, on that basis, denies them.

18 41. Hex lacks knowledge or information sufficient to form a belief about the truth of
19 the allegations of Paragraph 41 of the Complaint and, on that basis, denies them.

20 42. Hex lacks knowledge or information sufficient to form a belief about the truth of
21 the allegations of Paragraph 42 of the Complaint and, on that basis, denies them.

22 43. Hex admits that the card database for Hex: Shards of Fate contains a card titled
23 “Murder” and that the card includes the text “destroy target non-artifact troop” and “Quick
24 Action.” Hex denies the allegation of Paragraph 43 of the Complaint that the categorization of
25 “Quick Action” in Hex: Shards of Fate is the same game play mechanic as Wizards’ Magic’s

1 “Instant.” Hex lacks knowledge or information sufficient to form a belief about the truth of the
2 allegations of Paragraph 43 of the Complaint as they relate to Cryptozoic and, on that basis,
3 denies them. Except as specifically admitted, Hex denies the remaining allegations of Paragraph
4 43 of the Complaint as they relate to Hex except those allegations that consist of legal
5 contentions or legal arguments to which no response is required.

6 44. Hex lacks knowledge or information sufficient to form a belief about the truth of
7 the allegations of Paragraph 44 of the Complaint and, on that basis, denies them.

8 45. Hex admits that the card database for Hex: Shards of Fate contains a card titled
9 “Special Lotus” and that the card includes the text “artifact.” Hex further admits that the card
10 database for Hex: Shards of Fate contains a card titled “Spectral Lotus Garden”. Hex lacks
11 knowledge or information sufficient to form a belief about the truth of the allegations of
12 Paragraph 45 of the Complaint as they relate to any purported characterization or description of
13 Magic: The Gathering by Zvi Mowshowitz and, on that basis, denies them. Hex lacks
14 knowledge or information sufficient to form a belief about the truth of the allegations of
15 Paragraph 45 of the Complaint as they relate to Cryptozoic and, on that basis, denies them.
16 Except as specifically admitted, Hex denies the remaining allegations of Paragraph 45 of the
17 Complaint as they relate to Hex.

18 46. Hex admits that Appendix 1 to the Complaint contains a purported list comparing
19 cards from Hex: Shards of Fate with cards purportedly from “Magic: The Gathering.” Hex lacks
20 knowledge or information sufficient to form a belief about the truth of the allegations of
21 Paragraph 46 of the Complaint as they relate to Cryptozoic and, on that basis, denies them.
22 Except as specifically admitted, Hex denies the remaining allegations of Paragraph 46 of the
23 Complaint as they relate to Hex.

24 47. Hex admits that Dan Clark is a game designer working on the Hex: Shards of Fate
25 game. Hex lacks knowledge or information sufficient to form a belief about the truth of the

1 allegations of Paragraph 47 of the Complaint as they relate to Cryptozoic and, on that basis,
2 denies them. Hex lacks knowledge or information sufficient to form a belief about the truth of
3 the remaining allegations of Paragraph 47 of the Complaint as they relate to Hex and, on that
4 basis, denies them.

5 48. Hex further admits the rules regarding Hex: Shards of Fate are set forth at
6 <https://hextcg.com/howtoplay/>. Hex further admits that the card database for the Hex: Shards of
7 Fate game contains separate cards titled “Wrath of Zakiir” and “Zombie”. Hex lacks knowledge
8 or information sufficient to form a belief about the truth of the allegations of Paragraph 48 of
9 the Complaint as they relate to Cryptozoic and, on that basis, denies them. Except as
10 specifically admitted, Hex denies the remaining allegations of Paragraph 48 of the Complaint as
11 they relate to Hex.

12 49. Hex admits that a press release issued in connection with the Kickstarter
13 campaign launch and that the press release states “Kickstarter supporters of Hex will be
14 provided with a variety of unique collectable rewards including Beta invites for early access to
15 the game. Depending on their pledge level, backers can receive exclusive cards only available
16 through the Kickstarter campaign, customizable sleeves, starter sets, booster packs, in-game
17 bonuses such as increased loot drops and special equipment, exclusive access to tournaments
18 and much more. At the highest level, ‘Producer Tier’ backers will receive executive producer
19 credit, a vanity card, and the once-in-a-lifetime opportunity to create their own
20 personalized trading card.”

21 Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations
22 of Paragraph 49 of the Complaint as they relate to Cryptozoic and, on that basis, denies them.
23 Except as specifically admitted, Hex denies the remaining allegations of Paragraph 49 of the
24 Complaint as they relate to Hex.

25 50. Hex lacks knowledge or information sufficient to form a belief about the truth of

1 the allegations of Paragraph 50 of the Complaint and, on that basis, denies them.

2 51. Hex lacks knowledge or information sufficient to form a belief about the truth of
3 the allegations of Paragraph 51 of the Complaint and, on that basis, denies them. Hex denies
4 that Cryptozoic has infringed any protectable intellectual property right in the Magic game.

5 52. Hex admits that the card database for Hex: Shards of Fate contains a card titled
6 “Corrupt Harvester.” Except as specifically admitted, Hex denies the allegations of Paragraph
7 52 of the Complaint as they relate to any alleged similarity between Hex: Shards of Fate
8 “troops” cards and Wizards’ Magic “creatures” cards. Hex lacks knowledge or information
9 sufficient to form a belief about the truth of the remaining allegations of Paragraph 52 of the
10 Complaint as they relate to Wizards’ “creatures” cards and their abilities and, on that basis,
11 denies them. Except as specifically admitted, Hex lacks knowledge or information sufficient to
12 form a belief about the truth of the allegations of Paragraph 52 of the Complaint as they relate to
13 any third-party comparison between Hex: Shards of Fate cards and Wizards’ Magic cards and,
14 on that basis, denies them.

15 53. Hex admits that the card database for Hex: Shards of Fate contains cards titled
16 “Blessing the Fallen,” “Sapper’s Charge,” “Oracle Song,” and “Wild Growth.” Except as
17 specifically admitted, Hex lacks knowledge or information sufficient to form a belief about the
18 truth of the allegations of Paragraph 53 of the Complaint as they relate to any third-party
19 comparison between Hex: Shards of Fate card sets and Wizards’ Magic card sets and, on that
20 basis, denies them. Hex denies the remaining allegations of Paragraph 53 of the Complaint.

21 54. Hex admits that the card database for Hex: Shards of Fate contains a card titled
22 “Wild Shard.” Except as specifically admitted, Hex lacks knowledge or information sufficient
23 to form a belief about the truth of the allegations of Paragraph 54 of the Complaint as they relate
24 to any third-party comparison between Hex: Shards of Fate card sets and Wizards’ Magic card
25 sets and, on that basis, denies them. Hex denies the remaining allegations of Paragraph 54 of the

Complaint.

55. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 55 of the Complaint and, on that basis, denies them. Hex denies the allegations of Paragraph 55 as to user confusion.

56. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 56 of the Complaint and, on that basis, denies them. Hex denies the allegations of Paragraph 56 as to user confusion.

57. Hex admits that Paragraph 57 of the Complaint purports to show a screenshot of the game Hex: Shards of Fate and a screen shot of the game “Duels of the Planeswalkers 2014”. Except as specifically admitted, Hex denies the remaining allegations of Paragraph 57 of the Complaint.

58. Hex admits that the webpage at <https://hextcg.com/tell-all-your-friends> contains the statement “If it ain’t broke, don’t fix it” but denies the truth of Plaintiff’s characterizations of the statement. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 58 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Except as specifically admitted, Hex lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 58 of the Complaint as they relate to Hex and, on that basis, denies them. Hex denies any allegation that Hex: Shards of Fate is an “identical copy of Magic.”

59. Hex admits that in March of 2014, Wizards contacted Hex and informed Hex of Wizards’ alleged intellectual property rights in “Magic: The Gathering.” Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 59 of the Complaint as they relate to the table included in Paragraph 59 of the Complaint and which “elements Wizards found unacceptable.” Except as specifically admitted, Hex denies the remaining allegations of Paragraph 59 of the Complaint as they relate to Hex.

60. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 60 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex denies the allegations of Paragraph 60 of the Complaint as they relate to Hex.

V. FIRST CAUSE OF ACTION

COPYRIGHT INFRINGEMENT [17 U.S.C. §§101, SEQ.]

61. Hex incorporates by reference its denials and responses to Paragraphs 1-60 as if fully set forth herein. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 61 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 61 of the Complaint as they relate to Hex and, on that basis, denies them. Hex denies having access to copyrighted material.

62. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 62 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex denies the allegations of Paragraph 62 of the Complaint as they relate to Hex.

63. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 63 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex denies the allegations of Paragraph 63 of the Complaint as they relate to Hex.

64. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 64 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex denies the allegations of Paragraph 64 of the Complaint as they relate to Hex.

65. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 65 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 65 of the Complaint as they relate to Hex and, on that basis, denies them.

66. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 66 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex denies the allegations of Paragraph 66 of the Complaint as they relate to Hex.

67. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 67 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex denies the allegations of Paragraph 67 of the Complaint as they relate to Hex.

68. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 68 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex denies the allegations of Paragraph 68 of the Complaint as they relate to Hex.

69. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 69 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex denies the allegations of Paragraph 69 of the Complaint as they relate to Hex.

VI. SECOND CAUSE OF ACTION

(LANHAM ACT UNFAIR COMPETITION, FALSE ENDORSEMENT AND FALSE DESIGNATION OF ORIGIN [15 U.S.C. 1125(A)])

70. Hex incorporates by reference its denials and responses to Paragraphs 1-69 as if fully set forth herein.

71. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 71 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex denies the allegations of Paragraph 71 of the Complaint as they relate to Hex.

72. Hex denies the allegations of Paragraph 72 of the Complaint.

73. Hex denies the allegations of Paragraph 73 of the Complaint.

74. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 74 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex objects to the use of the term "Defendant" as indefinite and therefore denies

1 all allegations relating to “Defendant.” To the extent the term “Defendant” is meant to reference
 2 Hex, Hex denies all allegations of Paragraph 74 of the Complaint as they relate to Hex.

3 75. Hex lacks knowledge or information sufficient to form a belief about the truth of
 4 the allegations of Paragraph 75 of the Complaint as they relate to Cryptozoic and, on that basis,
 5 denies them. Hex denies the allegations of Paragraph 75 of the Complaint as they relate to Hex.

6 76. Hex lacks knowledge or information sufficient to form a belief about the truth of
 7 the allegations of Paragraph 76 of the Complaint as they relate to Cryptozoic and, on that basis,
 8 denies them. Hex denies the allegations of Paragraph 76 of the Complaint as they relate to Hex.

9 77. Hex lacks knowledge or information sufficient to form a belief about the truth of
 10 the allegations of Paragraph 77 of the Complaint as they relate to Cryptozoic and, on that basis,
 11 denies them. Hex denies the allegations of Paragraph 77 of the Complaint as they relate to Hex.

12 78. Hex lacks knowledge or information sufficient to form a belief about the truth of
 13 the allegations of Paragraph 78 of the Complaint as they relate to Cryptozoic and, on that basis,
 14 denies them. Hex denies the remaining allegations of Paragraph 78 of the Complaint as they
 15 relate to Hex.

16 79. Hex lacks knowledge or information sufficient to form a belief about the truth of
 17 the allegations of Paragraph 79 of the Complaint as they relate to Cryptozoic and, on that basis,
 18 denies them. Hex denies the allegations of Paragraph 79 of the Complaint as they relate to Hex.

19 **VII. THIRD CAUSE OF ACTION (LANHAM ACT UNFAIR COMPETITION,**
 20 **TRADE DRESS DILUTION [15 U.S.C. 1125(C)])**

21 80. Hex incorporates by reference its denials and responses to Paragraphs 1-79 as if
 22 fully set forth herein.

23 81. Hex lacks knowledge or information sufficient to form a belief about the truth of
 24 the allegations of Paragraph 81 of the Complaint as they relate to Cryptozoic and, on that basis,
 25 denies them. Hex denies the allegations of Paragraph 81 of the Complaint as they relate to Hex.

1 82. Hex lacks knowledge or information sufficient to form a belief about the truth of
2 the allegations of Paragraph 82 of the Complaint as they relate to Cryptozoic and, on that basis,
3 denies them. Hex denies the allegations of Paragraph 82 of the Complaint as they relate to Hex.

4 83. Hex denies the allegations of Paragraph 83 of the Complaint.

5 84. Hex denies the allegations of Paragraph 84 of the Complaint.

6 85. Hex lacks knowledge or information sufficient to form a belief about the truth of
7 the allegations of Paragraph 85 of the Complaint as they relate to Cryptozoic and, on that basis,
8 denies them. Hex objects to the use of the term “Defendant” as indefinite and therefore denies
9 all allegations relating to “Defendant.” To the extent the term “Defendant” is meant to reference
10 Hex, Hex denies all allegations of Paragraph 74 as they relate to Hex.

11 86. Hex lacks knowledge or information sufficient to form a belief about the truth of
12 the allegations of Paragraph 86 of the Complaint as they relate to Cryptozoic and, on that basis,
13 denies them. Hex denies the allegations of Paragraph 86 of the Complaint as they relate to Hex.

14 87. Hex lacks knowledge or information sufficient to form a belief about the truth of
15 the allegations of Paragraph 87 of the Complaint as they relate to Cryptozoic and, on that basis,
16 denies them. Hex denies the allegations of Paragraph 87 of the Complaint as they relate to Hex.

17 88. Hex admits that the Kickstarter fundraising campaign has raised “in excess of two
18 million dollars.” Hex lacks knowledge or information sufficient to form a belief about the truth
19 of the allegations of Paragraph 88 of the Complaint as they relate to Cryptozoic and, on that
20 basis, denies them. Hex denies the remaining allegations of Paragraph 88 of the Complaint as
21 they relate to Hex.

22 89. Hex lacks knowledge or information sufficient to form a belief about the truth of
23 the allegations of Paragraph 89 of the Complaint as they relate to Cryptozoic and, on that basis,
24 denies them. Hex denies the allegations of Paragraph 89 of the Complaint as they relate to Hex.
25

VIII. FOURTH CAUSE OF ACTION

(PATENT ACT – PATENT INFRINGEMENT [35 U.S.C. 271])

90. Hex incorporates by reference its denials and responses to Paragraphs 1-89 as if fully set forth herein.

91. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 91 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex denies the remaining allegations of Paragraph 91 of the Complaint as they relate to Hex.

92. Hex admits that United States Patent No. 5,662,332 (“the ’332 patent”) was issued with 60 claims, including over 25 independent claims in 1997 to Wizards and reissued as United States Patent No. RE 37,957 (“the ’957 Patent”) with 60 claims, including over 25 independent claims in 2003. Hex lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 92 of the Complaint regarding the ’332 Patent and the ’957 Patent and, on that basis, denies them. Hex denies the remaining allegations on Paragraph 92 of the Complaint.

93. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 93 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex denies the allegations of Paragraph 93 of the Complaint as they relate to Hex.

94. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 94 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex denies the allegations of Paragraph 94 of the Complaint as they relate to Hex.

95. Hex lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 95 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Hex denies the allegations of Paragraph 95 of the Complaint as they relate to Hex.

IX. RESPONSE TO PLAINTIFF'S PRAYER FOR RELIEF

Hex denies that Plaintiff is entitled to any relief in this action.

X. AFFIRMATIVE DEFENSES

By alleging the Affirmative Defenses set forth below, Hex does not agree or concede that they bear the burden of proof or the burden of persuasion on any of these issues, whether in whole or in part. For their Affirmative Defenses to the Complaint, Hex alleges as follows:

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim for Relief)

Wizards' Complaint, on one or more claims for relief set forth therein, fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(Lack of Subject Matter Jurisdiction/Failure to Register Copyright)

Wizards' claims are barred for a lack of subject matter jurisdiction because it lacks valid copyright registrations for the intellectual property rights asserted, or has not properly or timely registered the works.

THIRD AFFIRMATIVE DEFENSE

(Lack of Personal Jurisdiction)

The Court cannot adjudicate Wizards' claims because it lacks personal jurisdiction over Hex.

FOURTH AFFIRMATIVE DEFENSE

(Improper Venue)

The Court cannot adjudicate Wizards' claims because venue is improper.

FIFTH AFFIRMATIVE DEFENSE

(No Basis for an Injunction)

Wizards is not entitled to an injunction because (1) it is not likely to prevail on the merits,

(2) Wizards has not suffered and will not suffer irreparable harm because of any conduct by Hex, and (3) Wizards has an adequate remedy at law for its alleged injury.

SIXTH AFFIRMATIVE DEFENSE

(No Willful Infringement)

Wizards' claims for enhanced damages and an award of fees and costs against Hex have no basis in fact or law and should be denied.

SEVENTH AFFIRMATIVE DEFENSE

(No Damage)

Without admitting that the Complaint states a claim, there has been no damage in any amount, manner or at all by reason of any act alleged in the Complaint as to Hex, and the relief prayed for in the Complaint therefore cannot be granted.

EIGHTH AFFIRMATIVE DEFENSE

(Non-Infringement of the Patent-In-Suit)

Hex has not engaged in any act that constitutes direct or indirect infringement of any valid claim of the '957 patent, either literally or under the doctrine of equivalents.

NINTH AFFIRMATIVE DEFENSE

(Invalidity of the Patent-In-Suit)

The claims of the '957 patent are invalid for failure to comply with one or more of the requirements of Title 35, United States Code including, without limitation, §§ 101, 102, 103, and/or 112.

TENTH AFFIRMATIVE DEFENSE

(Estoppel)

Plaintiff is estopped from construing any valid claim of the '957 Patent to be infringed or to have been infringed, either literally or by application of the doctrine of equivalents, by any product made, used, imported, sold, or offered for sale by Hex in view of prior art and/or

1 because of admissions, representations, and/or statements made to the United States Patent and
2 Trademark Office during prosecution or reexamination of any application leading to the
3 issuance of the '957 Patent and any related patents, because of disclosure or language in the
4 specification of the patents-in-suit and any related patent, and/or because of limitations in the
5 claims of the '957 Patent.

6 **ELEVENTH AFFIRMATIVE DEFENSE**

7 **(Limitation on Patent Damages)**

8 Pursuant to 35 U.S.C. § 286, Plaintiff may not recover damages for any alleged
9 infringement of the '957 Patent committed more than six years prior to the filing of the
10 Complaint.

11 **TWELFTH AFFIRMATIVE DEFENSE**

12 **(Non-Infringement of Copyright)**

13 Hex has not engaged in any act that constitutes infringement of any valid Wizards
14 copyright.

15 **THIRTEENTH AFFIRMATIVE DEFENSE**

16 **(Invalid or Unenforceable Copyrights)**

17 Wizards' copyrights are invalid and/or unenforceable, including by reason of lack of
18 originality and lack of copyrightable subject matter.

19 **FOURTEENTH AFFIRMATIVE DEFENSE**

20 **(Copyright Functionality)**

21 The alleged violations of Plaintiffs' copyrights by Hex are barred, in whole or in part, on
22 the basis that the alleged copyrights at issue are functional.

23 **FIFTEENTH AFFIRMATIVE DEFENSE**

24 **(Copyright Misuse)**

25 Wizards' claims are barred pursuant to the doctrine of copyright misuse.

SIXTEENTH AFFIRMATIVE DEFENSE

(Copyright Fair Use)

The alleged violations of Wizards' copyrights by Hex are *de minimis*, nominative, and fair uses permitted under law.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Non-Infringement of Trade Dress)

Hex has not engaged in any act that constitutes infringement of any valid Wizards trade dress.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Invalid or Unenforceable Trade Dress)

Wizards' trade dress is invalid and/or unenforceable, including by reason of lack of distinctiveness and lack of likelihood of confusion, deception, or mistake.

NINETEENTH AFFIRMATIVE DEFENSE

(Lack of Secondary Meaning and/or Distinctiveness)

The claims made in the Complaint and the relief sought therein are barred, in whole or in part, on the basis that the alleged trade dress at issue is generic or lacks distinctiveness, including, without limitation, secondary meaning.

TWENTIETH AFFIRMATIVE DEFENSE

(Trade Dress Functionality)

The alleged violations of Wizards' trade dress by Hex are barred, in whole or in part, on the basis that the alleged trade dress at issue is functional.

TWENTYFIRST AFFIRMATIVE DEFENSE

(Trade Dress Fair Use)

The alleged violations of Wizards' trade dress by Hex are *de minimis*, nominative, and fair uses permitted under law.

TWENTYSECOND AFFIRMATIVE DEFENSE

(Trade Dress Misuse)

Wizards' claims are barred by the doctrine of misuse of trade dress.

TWENTYTHIRD AFFIRMATIVE DEFENSE

(No Dilution of Trade Dress)

Hex has not engaged in any act that has caused, or is likely to cause, dilution through blurring, tarnishment, or otherwise of any valid Wizards trade dress.

TWENTYFOURTH AFFIRMATIVE DEFENSE

(Reservation of Defenses)

Hex reserves the right to supplement or amend this answer, including through the addition of further affirmative defenses, based upon the course of discovery and proceedings in this action, including but not limited to, equitable defenses such as laches, waiver, acquiescence, and unclean hands.

PRAYER FOR RELIEF

For all of the above reasons, Hex prays that:

(1) Wizard's Complaint be dismissed with prejudice;

(2) Wizard take nothing by its Complaint;

(3) The Court declare this case to be exceptional under Section 285 of the Patent Act and award reasonable attorneys fees to Hex;

(4) The Court award Hex the cost of suit; and

(5) Hex be awarded with such other and further relief to which it may be justly entitled.

DEMAND FOR JURY TRIAL

Hex hereby demands a trial by jury on all issues so triable.

1 DATED this 29th day of August, 2014

2 DORSEY & WHITNEY LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of August, 2014, a true and correct copy of the foregoing Answer was electronically filed with the Clerk of the Court by using the CM/ECF system, which will serve a Notice of Filing on all counsel of record.

By: s/ Paul T. Meiklejohn